

From: [Moffatt, Brett](#)
To: [Campbell, Rich](#)
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FOIA Suit Seeks EPA Documents On 'Special Case' CWA Jurisdiction Finding Posted: July 30, 2015

An industry law firm is pursuing a Freedom of Information Act (FOIA) suit against EPA for documents relating to the agency's decision on whether particular waters are jurisdictional under the Clean Water Act (CWA), which could add to the growing list of legal attempts to subject the CWA findings to judicial review prior to enforcement.

The suit, filed July 24 in the U.S. District Court for the District of Columbia by the firm Hunton & Williams, seeks documents that the firm says were improperly withheld in response to a FOIA request on a California CWA jurisdictional determination (JD) that EPA is performing. The agency took on responsibility for the JD as a "special case" under rarely invoked CWA authority to take the place of the Army Corps of Engineers in making a jurisdictional finding -- a situation that Hunton & Williams' complaint calls "anything but normal."

"[T]he request for [a JD] under the CWA remains pending and now resides with EPA for a 'special case' determination under a seldom-used provision of the CWA," despite the agency apparently missing the deadline to exercise that power by nearly six months, according to the lawsuit.

Hunton & Williams is acting on behalf of DMB Redwood City Saltworks, a California company that asked EPA and the Corps to craft a JD on a 1,365-acre industrial site it owns before it would proceed with redevelopment plans.

Despite initially declining to participate, EPA in 2014 invoked its CWA power to take over JD development from the Corps -- which the complaint says blocked the Corps from releasing its already-completed JD that would have found no CWA jurisdiction over the property.

According to the complaint, Assistant Secretary of the Army for Civil Works (ASA) Jo-Ellen Darcy ordered the JD to be held indefinitely for a "legal and policy review" the day before its scheduled release, followed six months later by EPA taking over the process.

“Saltworks requested a meeting with ASA Darcy to understand the process and parameters of the Army’s legal and policy review, but that request was denied. Saltworks does not know why ASA Darcy intervened at the last moment to review the AJD, or what the 'legal and policy review' entailed,” the complaint says.

Under the CWA, EPA can exercise “special case” authority to perform a JD in place of the Corps, but that authority must be exercised within 10 days of an agency regional office's request to headquarters for approval.

The law firm's complaint says EPA Region 9 -- which includes California and other western states -- filed its request in May, before the Corps began its review of the pending JD, but EPA did not act until November.

The firm filed a FOIA request seeking documents related to EPA's actions on the Saltworks JD in 2014. Although the agency released some documents it has withheld at least 115 without listing which statutory exemptions from disclosure it is claiming in each case.

In the new suit, Hunton & Williams is seeking a more complete document release and an index of the agency's specific reasons for withholding each “responsive” document it does not disclose.

Pending Lawsuits

The FOIA case, *Hunton & Williams v. EPA*, is one of a series of suits now pending over JDs, although most of them are seeking facial review of an EPA or Corps determination, rather than release of a still-unsettled JD.

Most prominently, the Supreme Court is weighing a recycling firm's petition to consider whether the determinations can be reviewed in court, in *Kent Recycling Services v. U.S. Army Corps of Engineers*.

Kent is seeking review of a unanimous 2014 ruling by the U.S. Court of Appeals for the 5th Circuit that found JDs are not judicially reviewable because they do not set legal “rights or obligations” -- part of the test for when an agency action is “final” and thus subject to court challenge.

The justices have already rejected a petition for certiorari in the case, but Kent is asking them to reconsider that decision based on a conflicting ruling by the 8th Circuit, in *Hawkes Co., et al. v. U.S. Army Corps of Engineers*. There, a unanimous panel on April 10 ruled that JDs are “final,” and said the 5th Circuit was wrong to find otherwise.

Other facial challenges to JDs are pending in district courts, including Duarte Nursery Inc. v. Army Corps of Engineers, et al., in the U.S. District Court for the Eastern District of California, and Foster, et al. v. EPA, et al., before the U.S. District Court for the Southern District of West Virginia.

Both suits have survived motions to dismiss by the government and are proceeding with discovery -- the process of collecting information and evidence from the opposing parties.

The D.C. district case will not lead directly to a new ruling on JDs' reviewability, but could provide new information on EPA's procedures for conducting and relying on determinations that could support current and future challenges. -- David LaRoss (dlaross@iwpnews.com)

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Brett Moffatt
Office of Regional Counsel (ORC-2)
US EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
(415) 972-3946
(415) 947-3570 (fax)